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13

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16 UNITED STATES DISTRICT COURT
17 FOR THE EASTERN DISTRICT OF CALIFORNIA

18 UNITED STATES OF AMERICA,
19

Plaintiff,

20 v.

21 MODESTO ENERGY LIMITED
22 PARTNERSHIP, MODESTO
ENVIRONMENTAL CORP., ENPOWER
23 MANAGEMENT CORP., and
CMS GENERATION CO.

24 Defendants.
25
26
27
28

CIVIL NO.:

CONSENT DECREE

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CONSENT DECREE**I. BACKGROUND**

A. The United States of America ("United States"), on behalf of the Administrator of the United States Coast Guard ("USCG"), filed a complaint in this matter pursuant to Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9607, as amended ("CERCLA"), with respect to the recovery of response costs incurred and to be incurred by the United States in connection with releases or threatened releases of hazardous substances at the Westley Tire Site at 4549 Ingram Creek Road in Westley, California (the "Site"), as a result of a tire fire that occurred on or about September 22, 1999 ("Westley Tire Fire").

B. This Consent Decree provides for the Settling Defendant to pay Four Hundred Seventy Five Thousand Dollars (\$475,000.000) in Past Response Costs to the USCG as specified in Section V (Payment of Past Response Costs) of the Consent Decree.

C. The United States and Settling Defendant agrees, and this Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith, that settlement of this matter will avoid prolonged and complicated litigation between the Parties, and that this Consent Decree is fair, reasonable, and in the public interest.

THEREFORE, with the consent of the Parties to this Decree, it is ORDERED, ADJUDGED, AND DECREED:

II. JURISDICTION

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345 and 1355,

1 Section 107 of the Comprehensive Environmental Response,
2 Compensation, and Liability Act of 1980, 42 U.S.C. § 9607, as
3 amended ("CERCLA"), and also has personal jurisdiction over
4 Settling Defendant. Solely for the purposes of this Consent
5 Decree and the underlying complaint, Settling Defendant waives
6 all objections and defenses that they may have to jurisdiction of
7 the Court or to venue in this District.

8 III. PARTIES BOUND

9 2. This Consent Decree is binding upon the United States,
10 and upon Settling Defendant. Any change in ownership or
11 corporate or other legal status, including but not limited to,
12 any transfer of assets or real or personal property, shall in no
13 way alter the status or responsibilities of Settling Defendant
14 under this Consent Decree.

15 IV. DEFINITIONS

16 3. Unless otherwise expressly provided herein, terms used
17 in this Consent Decree that are defined in CERCLA or in
18 regulations promulgated under CERCLA shall have the meanings
19 assigned to them in CERCLA or in such regulations. Whenever
20 terms listed below are used in this Consent Decree or in any
21 appendix attached hereto, the following definitions shall apply:

22 a. "CERCLA" shall mean the Comprehensive
23 Environmental Response, Compensation, and Liability Act of 1980,
24 as amended, 42 U.S.C. § 9601, et seq.

25 b. "Consent Decree" shall mean this Consent Decree.
26 In the event of conflict between this Consent Decree and any
27 appendix, the Consent Decree shall control.

28 c. "Day" shall mean a calendar day. In computing any
period of time under this Consent Decree, where the last day

1 would fall on a Saturday, Sunday, or federal holiday, the period
2 shall run until the close of business of the next working day.

3 d. "DOJ" shall mean the United States Department of
4 Justice and any successor departments, agencies or
5 instrumentalities of the United States.

6 e. "Effective Date" shall be the effective date of
7 this Consent Decree as provided in Section XV (Lodging and
8 Opportunity for Public Comment).

9 f. "EPA" shall mean the United States Environmental
10 Protection Agency and any successor departments, agencies or
11 instrumentalities of the United States.

12 g. "EPA Hazardous Substance Superfund" shall mean the
13 Hazardous Substance Superfund established by the Internal Revenue
14 Code, 26 U.S.C. § 9507.

15 h. "Interest" shall mean interest at the current rate
16 specified for interest on investments of the Hazardous Substance
17 Superfund established by 26 U.S.C. § 9507, compounded annually on
18 October 1 of each year, in accordance with 42 U.S.C. § 9607(a).

19 i. "Paragraph" shall mean a portion of this Consent
20 Decree identified by an Arabic numeral or an upper or lower case
21 letter.

22 j. "Parties" shall mean the United States and
23 Settling Defendant.

24 k. "Past Response Costs" shall mean all costs,
25 including but not limited to direct and indirect costs, that EPA,
26 USCG or DOJ on behalf of EPA or USCG has paid at or in connection
27 with the Site through the date of entry of this Consent Decree.

28

1 1. "Person" shall mean an individual, corporation,
2 partnership, association, State, municipality, commission, or
3 political subdivision of a State, or any interstate body.

4 m. "Plaintiff" shall mean the United States of
5 America.

6 n. "Section" shall mean a portion of this Consent
7 Decree identified by a Roman numeral.

8 o. "Settling Defendant" shall mean CMS Generation Co.

9 p. "Site" shall mean the Westley Tire Site located
10 at 4549 Ingram Creek Road, Westley, California.

11 q. "United States" shall mean the United States of
12 America, including its departments, agencies and
13 instrumentalities.

14 r. "USCG" shall mean the United States Coast Guard
15 and any successor departments, agencies or instrumentalities of
16 the United States.

17 **V. PAYMENT OF RESPONSE COSTS**

18 4. Payment of Past Response Costs

19 a. Within thirty (30) days of entry of this Consent
20 Decree Settling Defendant shall pay the sum of Four Hundred and
21 Seventy Five Thousand Dollars (\$475,000) to the USCG.

22 b. The payment specified in Section V.a. (Payment of
23 Past Response Costs) shall be made to the USCG by Electronic
24 Funds Transfer to the U.S. Department of Justice in accordance
25 with instructions to be provided to Settling Defendant, following
26 entry of the Consent Decree, by the Financial Litigation Unit of
27 the U.S. Attorney's Office for the Eastern District of
28 California. Such monies are to be deposited in the Oil Spill
Liability Trust Fund. At the time of payment, Settling Defendant

1 shall simultaneously send written notice of payment and a copy of
2 any transmittal documentation (which should reference DOJ case
3 number 90-5-1-1-07881) to the Parties in accordance with
4 Paragraph 20 of this Consent Decree (Notices and Submissions) and
5 to:

6 United States Coast Guard
7 Commander Brian Judge
8 Office of Claims and Litigation
9 2100 Second Street, S.W.
10 Washington, D.C. 20593

11 and

12 United States Coast Guard
13 Lieutenant Commander S. Moody
14 National Pollution Funds Center
15 4200 Wilson Blvd., Suite 1000
16 Arlington, Virginia 22203

17 VI. FAILURE TO COMPLY WITH CONSENT DECREE

18 5. Interest on Late Payments. If Settling Defendant fails
19 to make any payment under Paragraph 4 (Payment of Response Costs)
20 by the required due date, Interest shall continue to accrue on
21 the unpaid balance through the date of payment at the rate
22 specified in 28 U.S.C. § 1961 (a) and (b) for a money judgment.

23 VII. COVENANT NOT TO SUE BY PLAINTIFF

24 6. Covenant Not to Sue by United States. Except as
25 specifically provided in VIII (Reservation of Rights by United
26 States), the United States covenants not to sue or to take
27 administrative action against Settling Defendant, and its past or
28 present officers, directors, general partners, limited partners,
parent companies (specifically limited to CMS Energy Corporation
and CMS Enterprises Company), subsidiaries, heirs, successors and
assigns, pursuant to Section 107(a) of CERCLA, 42 U.S.C.
§ 9607(a), Section 311 of the CWA, 33 U.S.C. § 1321, or Section
1002 of the OPA, 33 U.S.C. § 2702 for recovery of Past Response

1 Costs. This covenant not to sue shall take effect upon receipt
2 by USCG of all payments required by V, Paragraph 4 (Payment of
3 Past Response Costs). This covenant not to sue is conditioned
4 upon the satisfactory performance by Settling Defendant of its
5 obligations under this Consent Decree. This covenant not to sue
6 extends only to Settling Defendant and its past or present
7 officers, directors, general partners, limited partners, parent
8 companies (specifically limited to CMS Energy Corporation and CMS
9 Enterprises Company), subsidiaries, heirs, successors and
10 assigns, and does not extend to any other person.

11 **VIII. RESERVATIONS OF RIGHTS BY UNITED STATES**

12 7. The United States reserves, and this Consent Decree is
13 without prejudice to, all rights against Settling Defendant with
14 respect to all matters not expressly included within Section VII,
15 Covenant Not to Sue by Plaintiff, in Paragraph 6 (Covenant Not to
16 Sue by United States) and to the extent such matters are not
17 precluded by any applicable statute of limitations.

18 Notwithstanding any other provision of this Consent Decree, the
19 United States reserves all rights against Settling Defendant, to
20 the extent such matters are not precluded by any applicable
21 statute of limitations, with respect to:

22 a. claims based on a failure by Settling Defendant to
23 meet a requirement of this Consent Decree;

24 b. liability for costs incurred or to be incurred, if
25 any, by the United States that are not within the definition of
26 Past Response Costs;

27 c. liability for damages for injury to, destruction
28 of, or loss of natural resources, and for the costs of any
natural resource damage assessments;

1 d. criminal liability; and
2 e. liability arising from any future release of a
3 hazardous substance, pollutant or contaminant at the Site by
4 Settling Defendant.

5 8. Notwithstanding any other provision of this Consent
6 Decree, USCG reserves, and this Consent Decree is without
7 prejudice to, the right to reinstitute or reopen this action, or
8 to commence a new action seeking relief other than as provided in
9 this Consent Decree, if the Financial Information provided by
10 Settling Defendants is false or, in a material respect,
11 inaccurate.

12 9. Further notwithstanding any other provision of this
13 Consent Decree, the United States retains all authority and
14 reserves all rights to take any and all response actions
15 authorized by law with respect to the Site.

16 **IX. COVENANT NOT TO SUE BY SETTLING DEFENDANT**

17 10. Settling Defendant covenants not to sue and agrees not
18 to assert any claims or causes of action against the United
19 States, or its contractors or employees, with respect to Past
20 Response Costs or this Consent Decree, including but not limited
21 to:

22 a. any direct or indirect claim for reimbursement
23 from the Hazardous Substance Superfund based on Sections
24 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§
25 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of
26 law;

27 b. any claim arising out of the response actions at
28 the Site for which the Past Response Costs were incurred,
including any claim under the United States Constitution, the

1 Constitution of the State of California, the Tucker Act, 28
2 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412,
3 as amended, or at common law; or

4 c. any claim against the United States pursuant to
5 Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613,
6 relating to Past Response Costs.

7 d. Any claim against the United States under the CWA
8 or OPA with respect to the Westley Tire Fire, including but not
9 limited to , any direct or indirect claim for reimbursement from
10 the Spill Fund established pursuant to OPA, or under any
11 provision of law, or for events arising out of removal activities
12 in connection with the Westley Tire Fire.

13 11. Nothing in this Consent Decree shall be deemed to
14 constitute approval or preauthorization of a claim within the
15 meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R.
16 300.700(d).

17 12. Settling Defendant further hereby agrees not to oppose
18 the entry by this Court of this Consent Decree or any other
19 Consent Decree relating to the Westley Tire Site and filed
20 simultaneously with this Decree. Settling Defendant also agrees
21 not to challenge any provision of this Consent Decree or any
22 other Consent Decree relating to the Westley Tire Site and filed
23 simultaneously with this Consent Decree, unless the United States
24 have notified the Settling Defendant in writing that it no longer
25 supports entry of the Consent Decree.

26 **X. EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION**

27 13. Nothing in this Consent Decree shall be construed to
28 create any rights in, or grant any cause of action to, any person
not a Party to this Consent Decree. The Parties expressly

1 reserve any and all rights (including, but not limited to, any
2 right to contribution), defenses, claims, demands, and causes of
3 action that they may have with respect to any matter,
4 transaction, or occurrence relating in any way to the Site
5 against any person not a Party hereto.

6 14. The Parties agree, and by entering this Consent Decree
7 this Court finds, that Settling Defendant is entitled, as of the
8 date of entry of this Consent Decree, to protection from
9 contribution actions or claims as provided by Section 113(f)(2)
10 of CERCLA, 42 U.S.C. § 9613(f)(2), for "matters addressed" in
11 this Consent Decree. The "matters addressed" in this Consent
12 Decree are Past Response Costs.

13 15. Settling Defendant agrees that, with respect to any
14 suit or claim for contribution brought by it for matters related
15 to this Consent Decree, it will notify USCG and DOJ in writing no
16 later than sixty (60) days prior to the initiation of such suit
17 or claim. Settling Defendant also agrees that, with respect to
18 any suit or claim for contribution brought against it for matters
19 related to this Consent Decree, it will notify USCG and DOJ in
20 writing within ten (10) days of service of the complaint or claim
21 upon it. In addition, Settling Defendant shall notify USCG and
22 DOJ within ten (10) days of service or receipt of any Motion for
23 Summary Judgment, and within ten (10) days of receipt of any
24 order from a court setting a case for trial, for matters related
25 to this Consent Decree.

26 16. In any subsequent administrative or judicial proceeding
27 initiated by the United States for injunctive relief, recovery of
28 response costs, or other relief relating to the Site, Settling
Defendant shall not assert, and may not maintain, any defense or

1 claim based upon the principles of waiver, res judicata,
2 collateral estoppel, issue preclusion, claim-splitting, or other
3 defenses based upon any contention that the claims raised by the
4 United States in the subsequent proceeding were or should have
5 been brought in the instant case; provided, however, that nothing
6 in this Paragraph affects the enforceability of the Covenant Not
7 to Sue by Plaintiff set forth in Section VII (Covenant Not to Sue
8 by Plaintiff) or Settling Defendant's right to assert any
9 appropriate defense or claim in any subsequent proceeding by the
10 United States relating to matters not addressed in this Consent
11 Decree with respect to the Westley Tire Site.

12 XI. RETENTION OF RECORDS

13 17. Until two (2) years after the entry of this Consent
14 Decree, Settling Defendant shall preserve and retain all records,
15 reports, or information (hereinafter referred to as "records")
16 now in its possession or control, or which come into its
17 possession or control, that relate in any manner to response
18 actions taken at the Site or the liability of any person under
19 CERCLA with respect to the Site, regardless of any corporate
20 retention policy to the contrary.

21 18. After the conclusion of the two (2) year document
22 retention period in the preceding Paragraph, Settling Defendant
23 shall notify USCG and DOJ at least ninety (90) days prior to the
24 destruction of any such records, and, upon request by USCG or
25 DOJ, Settling Defendant shall deliver any such records to USCG.
26 Settling Defendant may assert that certain records are privileged
27 under the attorney-client privilege or any other privilege
28 recognized by federal law. If Settling Defendant asserts such a
privilege, it shall provide Plaintiff with the following: 1) the

1 title of the record; 2) the date of the record; 3) the name,
2 title, affiliation (e.g., company or firm), and address of the
3 author of the record; 4) the name and title of each addressee and
4 recipient; 5) a description of the subject of the record; and 6)
5 the privilege asserted. If a claim of privilege applies only to
6 a portion of a record, the record shall be provided to Plaintiff
7 in redacted form to mask the privileged information only.
8 Settling Defendant shall retain all records that it claims to be
9 privileged until the United States has had a reasonable
10 opportunity to dispute the privilege claim and any such dispute
11 has been resolved in the Settling Defendant's favor. However, no
12 records created or generated pursuant to the requirements of this
13 or any other settlement with the USCG pertaining to the Site
14 shall be withheld on the grounds that they are privileged.

15 19. Settling Defendant hereby certifies that, to the best
16 of its knowledge and belief, after thorough inquiry, it has not
17 altered, mutilated, discarded, destroyed or otherwise disposed of
18 any records, reports, or information relating to its potential
19 liability regarding the Site since notification of potential
20 liability by the United States or the State or the filing of suit
21 against it regarding the Site and that it has fully complied with
22 any and all USCG requests for information pursuant to Sections
23 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e),
24 and Section 3007 of RCRA, 42 U.S.C. § 6972.

25 **XII. NOTICES AND SUBMISSIONS**

26 20. Whenever, under the terms of this Consent Decree,
27 notice is required to be given or a document is required to be
28 sent by one party to another, it shall be directed to the
individuals at the addresses specified below, unless those

1 individuals or their successors give notice of a change in
2 writing. Written notice as specified herein shall constitute
3 complete satisfaction of any written notice requirement of the
4 Consent Decree with respect to the United States, USCG, DOJ, and
5 Settling Defendant, respectively.

6

7 AS TO THE UNITED STATES:

8 As to DOJ:

9 Chief, Environmental Enforcement Section
10 Environment and Natural Resources Division
11 U.S. Department of Justice DJ # 90-5-1-1-07881
12 P.O. Box 7611
13 Washington, D.C. 20044-7611

14 Angela O'Connell, Senior Counsel
15 Environmental Enforcement Section
16 U.S. Department of Justice
17 301 Howard Street, Suite 1050
18 San Francisco, California 94105
19 DJ # 90-5-1-1-07881

20 As to USCG:

21 Lieutenant Commander Sanders Moody
22 National Pollution Funds Center
23 Ballston Common Office Building, Suite 1000
24 4200 Wilson Boulevard
25 Arlington, Virginia 22203

26

27 AS TO SETTLING DEFENDANT:

28

29 Chris M. Amantea, Esq.
30 McDermott, Will & Emery
31 2049 Century Park East, 34th Floor
32 Los Angeles, California 90067

33 With a copy to:

34 Julio Mazzoli, Esq.
35 CMS Generation Co.
36 One Energy Plaza
37 Jackson, Michigan 49201

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XIII. RETENTION OF JURISDICTION

21. This Court shall retain jurisdiction over this matter for the purpose of interpreting and enforcing the terms of this Consent Decree.

XIV. INTEGRATION

22. This Consent Decree constitutes the final, complete, and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Consent Decree. The Parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Consent Decree.

XV. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

23. This Consent Decree shall be lodged with the Court for a period of not less than thirty (30) days for public notice and comment. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations that indicate that this Consent Decree is inappropriate, improper, or inadequate. Settling Defendant consents to the entry of this Consent Decree without further notice.

24. If for any reason this Court should decline to approve this Consent Decree in the form presented, this agreement is voidable at the sole discretion of any party and the terms of the agreement may not be used as evidence in any litigation between the Parties.

XVI. SIGNATORIES/SERVICE

25. Each undersigned representative of Settling Defendant to this Consent Decree and the Associate Attorney General, for the Environment and Natural Resources Division of the United

1 States Department of Justice certifies that he or she is
2 authorized to enter into the terms and conditions of this Consent
3 Decree and to execute and bind legally such Party to this
4 document.

5 26. Settling Defendant hereby agrees not to oppose entry of
6 this Consent Decree by this Court or to challenge any provision
7 of this Consent Decree, unless the United States has notified
8 Settling Defendant in writing that it no longer supports entry of
9 the Consent Decree.

10 Moreover, Settling Defendant hereby agrees not to
11 oppose entry of, or to challenge any provisions of, any other
12 Consent Decree relating to the Westley Tire Site lodged with this
13 Court simultaneously with this Consent Decree, unless the United
14 States has notified Settling Defendant in writing that it no
15 longer supports entry of the Consent Decree.

16 27. Settling Defendant shall identify, on the attached
17 signature page, the name and address of an agent who is
18 authorized to accept service of process by mail on behalf of that
19 Party with respect to all matters arising under or relating to
20 this Consent Decree. Settling Defendant hereby agrees to accept
21 service in that manner and to waive the formal service
22 requirements set forth in Rule 4 of the Federal Rules of Civil
23 Procedure and any applicable local rules of this Court, including
24 but not limited to, service of a summons. The Parties agree that
25 Settling Defendant need not file a response to the complaint in
26 this action unless or until the Court expressly declines to enter
27 this Consent Decree.

28

XVII. FINAL JUDGMENT

28. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute the final judgment between and among the United States and the Settling Defendant. The Court finds that there is no just reason for delay and therefore enters this judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

SO ORDERED THIS ____ DAY OF _____, 20__.

United States District Judge

1 THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United
2 States v. Modesto Energy Limited Partnership, Modesto Environmental Corp., Enpower
3 Management Corp., and CMS Generation Co., Civil Action No. _____, relating to the
4 Westley Tire Site.

5
6 FOR THE UNITED STATES OF AMERICA

7
8 Date: 5.11.04

9 _____
10 THOMAS L. SANSONETTI
11 Assistant Attorney General
12 Environment & Natural Resources Division
13 Environment and Natural Resources Division
14 U.S. Department of Justice
15 Washington, D.C. 20530

16
17 United States Attorney

18 _____
19 Angela O'Connell
20 Senior Counsel
21 Environmental Enforcement Section
22 Environment and Natural Resources Division
23 U.S. Department of Justice
24 P.O. Box 7611
25 Washington, D.C. 20044-7611
26
27
28

1 THE UNDERSIGNED PARTY enters into this Consent Decree, as of
2 December 31, 2003, in the matter of United States v. CMS
3 Generation Co., Civil Action No. _____, relating to the
4 Westley Superfund Site.

5
6 For the United States Coast Guard

7
8
9 Commander Brian Judge
10 Office of Claims and Litigation
11 U.S. Coast Guard
12 2100 2nd Street, SW
13 Washington DC 20593-0001

14 Lt. Commander Sanders Moody
15 Legal Counsel
16 U.S. Coast Guard
17 National Pollution Funds Center
18 4200 Wilson Blvd., Suite 1000
19 Arlington VA 22203-1804
20
21
22
23
24
25
26
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28

1 THE UNDERSIGNED PARTY enters into this Consent Decree, as of
2 December 31, 2003, in the matter of United States v. CMS
3 Generation Co., Civil Action No. _____, relating to the
4 Westley Superfund Site.

5
6 FOR CMS GENERATION CO.
7
8

9 Date: February 25, 2004

10 _____
11 THOMAS W. ELWARD
12 President and CEO
13 CMS Generation Co.
14 One Energy Plaza
15 Jackson, Michigan 49201-2276

16 Agent Authorized to Accept Service on Behalf of Above-signed
17 Party:

18 Name: Chris M. Amantea, Esq.

19 Title: Attorney

20 Address: McDermott, Will & Emery
21 2049 Century Park East, 34th Floor
22 Los Angeles, California 90067
23
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